1990

State of Utah v. Thomas R. Humphries : Brief of Appellant

Utah Supreme Court

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900006

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, Plaintiff and Respondent vs. THOMAS R. HUMPHRIES, Defendant and Appellant.	)	Priority No. 2 Case No. 900006

BRIEF OF APPELLANT

APPEAL FROM DECISION OF THE UTAH COURT OF APPEALS
AFFIRMING DEFENDANTS' CRIMINAL CONVICTION

TO REVIEW ISSUES RAISED BY APPELLANT'S
PETITION FOR WRIT OF CERTIORARI

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NATURE OF PROCEEDINGS AND JURISDICTION

Mr. Humphries filed a pro se petition for writ of certiorari on January 16, 1990, seeking review of a Court of Appeals decision, Case No. 880704-CA, affirming his criminal conviction in a jury trial. The Court granted Mr. Humphries' petition on April 24, 1990. The Court has jurisdiction to decide this appeal pursuant to Section 78-2-3(a) of the Utah Judicial Code (Utah Code Ann. § 78-2-3(a) (Supp. 1990)).

ISSUES PRESENTED FOR REVIEW

There are two primary issues on appeal:

1. In his appeal to the Utah Court of Appeals, was Mr. Humphries denied the effective assistance of counsel, as guaranteed by the Sixth Amendment to the Constitution of the United States?

2. Was Mr. Humphries entitled to have new counsel appointed by the Utah Court of Appeals?

DETERMINATIVE CONSTITUTIONAL PROVISIONS AND STATUTES

The following U.S. constitutional provisions are determinative:

U.S. CONSTITUTION - AMENDMENT VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to have the compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

Nature of the Case

Mr. Humphries appeals the decisions of the Utah Court of Appeals, affirming his criminal conviction and denying his motion to appoint new counsel on appeal. The Court granted Mr. Humphries' pro se Petition for Writ of Certiorari.

Course of Proceedings

Mr. Humphries was convicted in a jury trial on November 4, 1988, of issuing a bad check, in Second Judicial District Court, Davis County, the Honorable Douglas L. Cornaby, presiding. Mr. Humphries appealed his conviction to the Utah Court of Appeals. In a memorandum decision, the Court of Appeals affirmed Mr. Humphries' conviction. Mr. Humphries filed a Petition for Writ of Certiorari with the Court, which was granted April 24, 1990.

Facts Relevant to the Present Appeal

Facts Relative to Conduct of Counsel at Trial

1. Mr. Humphries was tried before a jury for issuing a bad check. (Trial Transcript, p. 22). Mr. Humphries' sole defense was that he had given $3,600 to a friend of his, Dorie Stewart, and assumed the money had been deposited by her in his bank account. (Id. at 174-178).

2. Dorie Stewart was called by the defense and was asked some preliminary questions. Defense counsel then asked: "At one time did Tom give you some money towards the middle part of May?" Before she could answer, the prosecutor requested to voir dire the witness. The jury was removed and the prosecutor conducted the following examination:

BY MR. NAMBA:

Q. Dorie, do you understand what the Fifth Amendment of the Constitution -- when we talk about taking the Fifth Amendment, do you know what that means?
A. Uh-huh.
Q. Do you understand that you have a right against having to say anything in court that would indicate that you've done anything that's criminal? Do you understand that?
A. Yes.
Q. I'm having to anticipate somewhat some of the things that you might be asked to testify about just based upon the conversations that I've had from counsel.
Do you understand that if you took money without permission from someone, even though that person may have owed you that money, that could be considered theft?
A. Yeah.
Q. That you could be prosecuted for that?
A. Uh-huh.
Q. You understand, as you testify here, no one has offered you any immunity and you could, therefore -- the things that you say here could be used against you?
A. Uh-huh.
Q. You understand, also what the word "perjury" means?
A. Yeah.

Q. Could you explain to the Court what you understand perjury to mean.

A. If I get up here and I don't tell the truth, lying to the Court.

Q. You understand there would be a criminal penalty if you were to say anything other than the truth?

A. Uh-huh.

Q. Understanding those things, you understand that if you desire not to testify, you can tell counsel or the Court that you don't want to answers questions?

A. Uh-huh.

Q. Even though, and that you still want to answer questions today?

A. Yeah.

. . . .

THE WITNESS: Can I ask a question?

THE COURT: Just a minute, wait outside again.

THE WITNESS: If you start asking me questions about the money and I don't want to answer, I don't have to answer if I take the Fifth Amendment?

THE COURT: Let me explain what it is. Any answer that would tend to incriminate you in a crime, you are not required to answer and you can say: "I wish not to answer that based on the Fifth Amendment because it would tend to incriminate me." That's what you must say.

Mr. Humphries' counsel did not object to the voir dire. The jury was brought back in, defense counsel rephrased his initial question and Ms. Stewart refused to answer, citing the Fifth Amendment. Defense counsel tried a slightly different question. Ms. Stewart gave the same response. She was excused.

3. In closing argument, the prosecutor referred to Ms. Stewart's failure to testify as follows:

> We had a witness who took the stand who said nothing. Dorie said nothing. She took the Fifth Amendment. What does that mean to you? Don't get caught in the trap to think that's an admission on her part. I submit to you that she didn't want to hurt her friends here, that her friend had asked her to come and testify, gave her a subpoena which she couldn't disobey. She had to sit on the stand. She wanted to tell the truth. She didn't want to lie, but she also didn't want to tell the hard truth and that is that this man is dishonest. She took the easy way out by claiming the Fifth Amendment.

(Id. at 216-217). Mr. Humphries' counsel did not object.

4. The judge gave no instruction on how or if the jury was to interpret Ms. Stewart's reliance on the Fifth Amendment in her refusal to answer questions. Mr. Humphries' counsel did not request such an instruction nor did he object to its absence.

5. The prosecutor, in cross-examining Mr. Humphries, asked the following: "Q. Steve is a friend of yours? A. A business relationship. Q. You didn't ask him to come and testify?" (Id. at 182). Counsel for the defense did not object to the question. In closing argument, the prosecutor then remarked on Mr. Humphries' failure to establish his defense:

> Don't you think you could come up with some proof that you held an insurance claim with someone when you have three partners to split the money, two other partners to split the money with, one of them that would come and testify that we split the money with him or the insurance company?

(Id. at 215). Mr. Humphries' counsel did not object to the prosecutor's statement.

6. During closing argument, the prosecutor, at least five times, called Mr. Humphries dishonest, in just those terms.[1] He both began and ended his closing argument with that point. His first sentence included the following: ". . . [W]e never

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[1]"The Defendant is a dishonest person," (id. at 212); "this man is dishonest," (id. at 217); "disregard the testimony of the Defendant because of his dishonesty," (id. at 227); "I've tried to tell to today that the defendant is dishonest," (id. at 228); and, "That's the statement of a dishonest man." (Id. at 230).

told you that the Defendant was going to be honest, that he was going to tell the truth, or that he had ever told the truth in any day of his life" (id. at 211) and his last sentence began: "That's the statement of a dishonest man . . . ." (Id. at 230). Mr. Humphries' trial attorney made no objections at any time during closing argument.

Facts Relative to Conduct of Counsel on Appeal

7. At sentencing, Mr. Cathcart, Mr. Humphries' trial counsel, informed the court he had taken on Mr. Humphries' representation because all three public defenders had conflicts, including Mr. Vanderlinden. (Sentencing Transcript, December 6, 1988, p. 10; "THE COURT: Okay. Why were you appointed as opposed to Mr. Vanderlinden or Mr. Oda? MR. CATHCART: All three public defenders had a conflict is what I was told by Mr. Cella.")

8. Mr. Cathcart withdrew from representing Mr. Humphries after sentencing. (Id. at 9.)

9. At the first hearing on the motion for certificate of probable cause, December 20, 1988, the other attorneys in the public defender office indicated to the court, and it also began to dawn on Mr. Humphries, that Mr. Vanderlinden had made and was making every effort to avoid representing Mr. Humphries, both at trial and on appeal.[2] (Motion for Certificate of Probable Cause

[2]MR. CELLA: . . . Under the public defender system contract, my conflicts of interest are supposed to be assigned to Mr. Vanderlinden. Mr. Vanderlinden felt that the conflict generated by my prosecution for Kaysville City was not a true conflict under the scope of the public defender contract, and he

transcript, December 20, 1988, pp. 3-6). Mr. Humphries acquiesced to Mr. Vanderlinden representing him on appeal at that time. (Id. at 5-6)

10. At a hearing on January 3, 1989, the suggestion that Mr. Vanderlinden had a conflict preventing him from representing Mr. Humphries was resolved. Mr. Humphries also expressed that he had no personal conflict with Mr. Vanderlinden,

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declined to accept the --accept the case through the public defender system.

. . . .

MR. CELLA: Stephan [Oda] and I spent a few minutes talking with Judge Page about the probability of trying to get some idea of where the Court wanted us to go on this matter. And Judge Page requested and said that in situations such as that and in the event that Mr. Vanderlinden declined to accept my conflict of interest, that that position should be made known to the Court.

THE COURT: When did you talk to Mr. Vanderlinden last on this? I talked to him a week ago, and he was going to do this personally.

MR. CELLA: That's total news to me.

THE COURT: I talked with him right after we were in court two weeks ago. I worked with him for three or four days. And by Friday, a week ago, last Friday, he said I'll take the case.

. . . .

MR. CELLA: . . . So in any event, as I was explaining, Judge Page said in additional situations such as that, I should merely inform the Court and order the Court to order Mr. Vanderlinden to take the case. And Judge Page said that would be how to handle the matter.

. . . .

THE COURT: . . . Mr. Vanderlinden has already accepted the case and was supposed to be here today. I was surprised he wasn't here.

since he "never met the gentleman before." However, Mr. Humphries expressed concern that "Attorney Vanderlinden, he doesn't want to argue the specific [sic - probably "certificate"] of probable cause, a few issues actually," and, later on in the hearing, qualified the judge's assertion that he had not objected to the appointment of Mr. Vanderlinden with "[o]nly if he can effectively represent me . . . ." (Transcript, January 3, 1989, pp. 5-6)

11. Mr. Humphries requested appointment of counsel other that Mr. Vanderlinden by way of a handwritten letter to the judge and a motion dated January 10, 1989. (District Court file, pp. 108-111). At a hearing prompted by the letter and motion, Mr. Humphries expressed frustration over Mr. Vanderlinden's apparent lack of preparation to date and lack of communication with him. The court gave him the choice of proceeding pro se or using Mr. Vanderlinden. (Hearing Transcript, January 31, 1989).

12. At the March 14, 1989 hearing on his motion for certificate of probable cause, Mr. Humphries again expressed frustration at Mr. Vanderlinden's lack of communication with him and forewarned the court that Mr. Humphries might need to present issues that Mr. Vanderlinden might not argue. (Motion for Certificate of Probable Cause Transcript, March 14, 1989, pp. 3-6)

13. The crux of Mr. Humphries' disagreements with Mr. Vanderlinden's handling of his case came out in the March 28, 1989 hearing of the motion for certificate of probable cause.

Mr. Vanderlinden raised various issues in support of the motion, to which the prosecutor responded. Mr. Humphries then addressed the court:

> Your Honor, if I may, please. I asked counsel to bring up these issues before. He didn't think it was proper at the time, but I think he has second thoughts after Attorney Namba.
>
> Attorney Namba brought up the issue of prosecutorial misconduct. And we would ask the Court that it would consider the misconduct, the statements of dishonesty throughout his closing argument when viewed as a whole whether they would be considered plain error and to go further into the ineffectiveness of counsel during the trial, for counsel not to object to all these different things through the trial: the voir dire, Attorney Namba's repeated references to my dishonesty, instructions to the jury, even association whether the jury foreman recognized a witness. And Attorney Cathcart failed to object, and the Court did not delve in a little bit further into that relationship. So when viewed as a whole, would Attorney Cathcart's representation be considered ineffective assistance of counsel?

(Certificate of Probable Cause Transcript, March 28, 1989, pp. 19-20). Mr. Humphries also reiterated his attorney's failure to communicate. "Your Honor, if I may, I've had no conversation with Attorney Vanderlinden whatsoever. If I could direct the Court to also notify me from the Court directly and not just through Vanderlinden." (Id. at 20)

14. In his ruling on the motion for certificate of probable cause, as to two issues raised by Mr. Vanderlinden in his argument, the judge described the State's actions as improper, but in both instances indicated that no objections had been made at trial by defendant's counsel. As to a third issue, the court, while noting no substantive error, further noted that

no proper objection was made in any case. The court did not respond to the "plain error" and "ineffective assistance of counsel" claims raised by Mr. Humphries in oral argument. (District Court file, pp. 204-205)

15. In his appeal brief to the Utah Court of Appeals, Mr. Vanderlinden did not raise the "plain error" or "ineffective assistance of counsel" claims. The State, not surprisingly and taking its que from the judge's decision in the motion for certificate of probable cause, argued to the Court of Appeals that four of the five issues raised on appeal had not been preserved for appeal.

16. Mr. Humphries again attempted to seek appointment of new counsel pro se, this time in motion made to the Court of Appeals. The motion was denied, apparently without hearing, and on the justification that all materials due from Mr. Vanderlinden had been filed timely with the Court of Appeals and upon the finding that "Appellant show no substantial conflict of interest with his attorney." (Order, July 20, 1989. A copy of the stamped "filed" order is attached as Exhibit 1.)

17. The Court of Appeals held that four of the five issues raised by Mr. Vanderlinden had not been preserved for appeal due to trial counsel's failure to object during trial.

ARGUMENT

I. Summary of Argument

Defendant was denied his right to effective appellant counsel by counsel's failure to raise meritorious issues before

the Court of Appeals, contrary to professional standards of performance, and contrary to the express wishes of his client.

Defendant was also denied the effective assistance of counsel by the Court of Appeals denial of his motion to appoint new counsel during the pendency of the appeal.

II. Denial of Effective Assistance of Appellate Counsel

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), provides the standard by which courts must determine whether a criminal defendant has been denied the effective assistance of counsel at trial. As this Court has noted:

> In order to prevail on such a claim, a defendant must show, first, that his or her counsel rendered a deficient performance in some demonstrable manner, which performance fell below an objective standard of reasonable professional judgment, and, second, that counsel's performance prejudiced the defendant.

State v. Carter, 776 P.2d 886, 893 (1989). That is the law with respect to effective assistance of trial counsel.

The law as to denial of effective assistance of appellate counsel appears somewhat more unsettled, particularly in Utah where the issue has not been directly addressed. In other jurisdictions, there is a split of authority on the standard to be applied in appellate counsel's performance. As set forth in some detail in People v. Valdez, 789 P.2d 406 (Colo. 1990), the U.S. Supreme Court has not yet articulated a test for determining ineffective assistance of appellate counsel claims. As a result, some jurisdictions have simply adopted the

Strickland two-part test, deficient performance by appellate counsel and prejudice to the defendant must both be shown in order for a defendant to prevail on the claim. In Valdez, the Colorado court adopted the Strickland test for ineffective appellate counsel claims.

Importantly, as noted in Valdez, "[o]ther courts have indicated that, for purposes of determining whether a particular defendant has been denied effective assistance of appellate counsel, deficient performance alone is sufficient to establish a deprivation of the constitutional right." Id. at 410 (citations omitted).

Defendant urges adoption of the single standard by the Court. Establishing a deficient performance by an appellate counsel is a heavy burden that, if met, would already strongly suggest that an appellant's position on appeal had been prejudiced. Proof that defendant would have obtained a more favorable result on appeal requires examination into both the appeal process itself and the underlying trial issues on appeal.[3]

In any event, defendant's recitation of and analysis of the facts in this case and the controlling law establishes that, in this case, both Strickland elements have been met and defendant was, indeed, denied effective assistance of appellate

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[3]Interestingly, none of the cases cited by the Court in footnote 26 of Carter dealt with the deficient performance issue, since the Court disposed of the claims on the prejudice issue alone, finding no prejudice to the defendant in every case.

counsel in violation of his Sixth Amendment constitutional rights.

III. Defendant Was Denied Effective Assistance of Appeal Counsel

A. Counsel's Performance Was Deficient.

Mr. Vanderlinden failed to raise or argue on appeal that Mr. Humphries was denied the effective assistance of trial counsel when trial counsel did not object to various clearly objectionable tactics of the prosecutor. Mr. Vanderlinden also failed to raise or argue on appeal that the errors complained of were manifest or plain errors, for which objections at trial were not necessary in order to preserve the issues for appeal.

In another context, such failure may not amount to a deficient professional performance. Given the peculiar facts of this case, however, it is apparent that Mr. Vanderlinden's performance was deficient.

Mr. Vanderlinden represented Mr. Humphries in the post-trial motions phase of this case, in addition to representing him on appeal. In the certificate of probable cause hearing and in its order, the trial judge alerted Mr. Vanderlinden to the problem of trial counsel's failure to object during trial to the various tactics that became the issues on appeal. The judge's order indicated that three of the issues, whether meritorious or not, were not reserved by proper objection during trial. The judge indicated that some actions by the State were, in fact, improper, but that defendant did not object (an observation echoed by the Court of Appeals). Mr. Vanderlinden's independent

review of the transcript surely further highlighted the failure of trial counsel to object at appropriate times.[4]

Mr. Humphries, at the hearing on March 28, 1989, made it clear that he was aware of and had discussed the ineffective assistance of counsel and plain error issues with Mr. Vanderlinden prior to that hearing and that Mr. Vanderlinden had indicated "[h]e didn't think it was proper at the time." Which left Mr. Humphries to argue the issues orally to the judge. The issues were, thus, well known to Mr. Vanderlinden as his client had expressed his interest in pursuing them.

While it is easy in hindsight to second guess an attorney's appellate performance[5], two meritorious defenses to defendant's conviction were not argued to the Utah Court of Appeals. Not only were the claims meritorious, they turned out to be the only claims that defendant could have used to overcome what later become the Court of Appeals' decision that four of defendant's five claims of error had not been preserved for appeal by trial counsel.

The doctrine of plain error does not require that the error be raised or the issue reserved at trial to be asserted on appeal. Instead, if the error is obvious and is harmful (prejudicial to the defendant), an appellate court can review and

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[4]The State picked up on this information. Its brief on appeal relied almost exclusively on the theory that none of the issues had been preserved for appeal.

[5]I am looking over my shoulder as I prepare this brief.

rule on the error. See, e.g., State v. Anderson, 789 P.2d 27, 29 (Utah 1990) and cases cited in footnote 6 thereof; State v. Bullock, 791 P.2d 155 (Utah 1989); Utah Rules of Evidence 103(d).

Likewise, a claim that trial counsel was ineffective can be asserted on appeal for the first time, which is obvious since it will rarely be trial counsel himself or herself who will raise the issue of his or her own ineffectiveness.

The converse to the above discussion is also well established law. "[I]n the absence of exceptional circumstances or plain error, an appellate court normally will not consider issues, even constitutional ones, that have not been presented first to the trial court for its consideration and resolution." State v. Webb, 790 P.2d 65, 71 n.2 (Utah App. 1990) (citing State v. Anderson, supra). See also State v. Verde, 770 P.2d 116, 118 (Utah 1989) ("Ordinarily, the failure to raise an objection below would preclude our consideration of this argument on appeal.") Mr Vanderlinden knew the objections had not been made during trial by Mr. Humphries' counsel, so that absent unusual circumstances the claims were not preserved for appeal.

Yet, despite his forewarning from a review of the trial transcript and from the judge's decision on the certificate of probable cause that the issues he was pursuing had not been properly objected to or reserved for appeal, despite his own client urging him to make the claims, despite his presumed knowledge of the law, Mr. Vanderlinden did not make the plain error or ineffective assistance claims.

This was not simply an error in strategy or tactics on appeal. It was a deficient legal performance on appeal by Mr. Vanderlinden, and expressly and intentionally contrary to his client's requests and admonitions that those issues be presented to the Court of Appeals. Everyone else was aware of the fundamental problem with Mr. Vanderlinden's chosen approach, the trial judge, the State prosecutor, the Attorney General, and the three-member appeals panel.

B. Defendant Was Prejudiced by Counsel's Ineffectiveness.

The Court of Appeals would have reversed defendant's conviction had the proper issues been raised and argued. The substantive law cited in Mr. Vanderlinden's appeal brief and his application of the law to the facts is, for the most part, very accurate. But for his failure to argue that the errors were not objected to in timely fashion, raising the issue of denial of effective assistance of counsel, or that they were obvious and harmful, raising the issue of plain error, he would have in all likelihood prevailed.

As evidence of his likelihood of prevailing on the proper issue on appeal, note that the trial court, in its ruling on the motion for certificate of probable cause, indicated "[t]he State should not have questioned the defendant about his failure to have Steve Brown come to court and testify." District Court file, p. 205. The Court of Appeals also said "it is inappropriate during cross examination for the prosecution to

make any suggestion that defendant has a burden to establish a defense. . . ."

Examined on appeal for their substance and without the shackles of trial counsel's failure to object, it is obvious that the prosecutor committed several significant errors, any one of which is sufficient grounds for reversal, but all of which add up to a very tainted trial.

The defendant had one and only one defense, having admitted to opening the bank account, making a $100 deposit and then writing checks totalling more than $100. His defense was that he had received $3,600 and had given it to Dorie Stewart to deposit in his account. Apart from his own testimony regarding the event, the only corroborating testimony for Mr. Humphries could come from Ms. Stewart herself. She became the key witness for the defense and she also became the only person on whom the prosecutor focused his "voir dire," explaining the far-fetched notion that Ms. Stewart might face criminal prosecution for theft if she took money from someone without permission whether they owed her the money or not.

The prosecutor's intimidation of the defendant's key witness, singling her out for the cautionary statements about perjury, suggesting that she could be prosecuted for theft in most unusual ways, without intervention of the court and without mention of her possible need to consult independent counsel, this was calculated to drive the witness from the stand, and resulted in her not testifying. The United States Supreme Court found

such conduct by a judge to be violative of the defendant's right under the Fourteenth Amendment to the voluntary and free testimony of witnesses on his behalf, in Webb v. Texas, 409 U.S. 95, 93 S.Ct. 351, 34 L.Ed.2d 330 (1972).

Mr. Humphries' situation meets the criteria the Arizona Supreme Court noted was most frequently present in granting reversal. In State v. Dumaine, 783 P.2d 1184, 1191 (Ariz. 1989), the court noted that "cases requiring reversal usually arise where the defendant was completely deprived of the defense witness's testimony." That is what happened here, after the intimidation by the prosecutor of Ms. Stewart.

Once the prosecutor was successful in shutting Ms. Stewart's mouth, he focused his attack on the only other person to testify to anything of substance for the defense, Mr. Humphries. No fewer than five times in closing argument he called Mr. Humphries dishonest, and implied the same throughout his closing argument. The trial judge makes the astounding leap of reasoning in his ruling on the motion for certificate of probable cause that "[w]hat the State was really saying, however, was that the evidence shows the defendant was dishonest." (District Court file at 205). Unfortunately, the Court of Appeals did not have to dissect that reasoning because of the trial counsel's failure to object and appellate counsel's failure to raise the appropriate issues for consideration.

Had they examined the reasoning, the Court of Appeals would have agreed that the prosecutor, in closing argument, was

referencing matters not in evidence, and, therefore, not to be speculated about, and was offering his personal opinion about the defendant's veracity in testifying, without a single reference to the evidence. Since the defendant had admitted to everything the prosecution was trying to prove but the defendant's intent to write checks on insufficient funds, the prosecution in closing argument can only be referring to Mr. Humphries' own testimony regarding his belief that a deposit of $3,600 had been made to his bank account or to the unheard testimony of Ms. Stewart.

Let's take those possibilities one at a time. If the prosecution was saying in closing argument "Mr. Humphries is lying about his belief as to the deposit having been made" he was expressing his personal opinion, pure and simple. There was no contrary evidence regarding Mr. Humphries' belief as to the deposit having been made. Yet, instead of telling the jury they should convict because the circumstantial evidence discredits Mr. Humphries' testimony, and leaving it to the jury to weigh the conflicting evidence and come to a conclusion, the prosecution says "this man is dishonest," over and over and over again. Not only was all of Mr. Humphries' testimony immediately discredited by such a blatant personal attack, but the jurors were then left to wonder what else the prosecutor knew that gave him such a violent opinion of the untrustworthiness of the defendant.

The second possibility, that of the prosecution referring in closing to the unheard testimony of Ms. Stewart, is what the prosecution in fact did, in reference to the dishonesty

of Mr. Humphries. Not only did the prosecution improperly suppose that Ms. Stewart's testimony would have had to have been a lie to support Mr. Humphries, but he ended by saying "[s]he didn't want to lie, but she also didn't want to tell the hard truth and that is that this man is dishonest. She took the easy way out by claiming the Fifth Amendment." Trial Transcript at 217 (emphasis added).

In one highly improper and prejudicial fell swoop, the prosecutor speculated as to the unheard testimony of Ms. Stewart and assured the jury that it provided further evidence Mr. Humphries was a liar.

There was no objection to any of the foregoing, an obvious and clear error by Mr. Humphries' trial attorney. Neither was there any attempt to alleviate the problem through requested instructions, explanations or intervention of the trial judge or counsel for the defendant. To the jury, defendant was left looking like a liar who had tried to get Ms. Stewart to lie for him in alibi. Yet, Ms. Stewart having taken the Fifth Amendment suggests exactly the opposite (i.e., that she did indeed receive money from Mr. Humphries and did not do with it what she told him she would and was, therefore, afraid of prosecution), which makes the prosecutor's speculation about her failure to testify doubly-damaging and deliberately confusing to the jury.

Personal opinions of the prosecutor expressed in closing argument are grounds for reversal. This universal rule

is well illustrated in State v. Reed, 684 P.2d 699 (Wash. 1984), which has some parallels useful to consider in the present case. In a jury trial for murder, the prosecutor called the defendant a liar three times during closing argument and made other references outside the scope of the evidence. The Washington Supreme Court overturned the court of appeals decision that, although improper, the statements were not prejudicial. The supreme court noted that the statements were prejudicial as striking at the heart of the defense raised and there was a substantial likelihood the comments affected the jury. Id. at 703.

Likewise here, the untoward comments of the prosecutor went to the heart of the defense in the action and, far from being harmless, were calculated to paint Mr. Humphries as totally dishonest, making his entire testimony unbelievable, and to improperly suggest that Ms. Stewart would have had to have lied to corroborate Mr. Humphries' version of events.

Had the Court of Appeals gotten to the substance of the claims of error, it would have reversed the conviction of Mr. Humphries due to the prejudicial nature of the errors. Mr. Vanderlinden's failure to raise the appropriate issues was the cause of Mr. Humphries' failure at the Court of Appeals.

IV. Court of Appeals Actions Denied Appellant His Right to Counsel

Mr. Humphries made a motion to the Court of Appeals to grant him new counsel on appeal. The motion was denied. The

failure of the Court of Appeals to follow its own admonitions in ascertaining the reasons for Mr. Humphries' motion, in carefully considering the motion and in making an informed decision resulted in Mr. Humphries being denied effective assistance of appellate counsel.

The motion was made pro se and was answered by the Court of Appeals order denying the motion, citing as its reasons the promptness of Mr. Vanderlinden in filing required documents with the court and the lack of a substantial conflict of interest. See Exhibit 1.

In State v. Pursifell, 746 P.2d 270 (Utah App. 1987), the Court of Appeals articulated the following with regard to motions to appoint new counsel addressed to trial counsel:

> We fully appreciate the possibility that defendants will fabricate complaints about counsel in an effort to promote delay or otherwise manipulate the system. Weighed against that realization, however, must be recognition of the inability of many indigent defendants, in view of their level of education and sophistication, to adequately articulate their legitimate complaints involving appointing counsel.
> . . . .
> [W]hen dissatisfaction is expressed, the court must make some reasonable, non-suggestive efforts to determine the nature of the defendants' complaints and to apprise itself of the facts necessary to determine whether the defendant's relationship with his or her appointed attorney has deteriorated to the point that sound discretion requires substitution or even to such an extent that his or her Sixth Amendment right to counsel would be violated but for substitution.

Id. at 273.

Had the Court of Appeals followed its advice to trial judges, which applies with equal force to it when it is called

upon to consider a motion to appoint new counsel filed by an indigent client, Mr. Humphries would have been able to explain his significant problems with Mr. Vanderlinden refusing to raise meritorious claims on appeal. No reasonable, non-suggestive efforts to determine the nature of defendant's complaints and to apprise itself of the facts was undertaken by the Court of Appeals.

Investigation of the record on appeal gives a better understanding of the problems than expressed by the Court of Appeals in its order. While, as the Court of Appeals correctly noted, Mr. Humphries' initial concerns were somewhat confused and disorganized, over time Mr. Humphries, who has demonstrated himself to be a quick study of the law, honed in on the important issues on appeal and expressed on the record his inability to communicate his impressions to counsel and, most importantly, counsel's refusal to raise meritorious issues on Mr. Humphries' behalf.

The actions of the Court of Appeals constituted an abuse of its discretion in the matter and resulted in the violation of Mr. Humphries Sixth Amendment right to counsel, counsel who would follow Mr. Humphries' expressed, non-frivolous (on the contrary, highly meritorious) recommendations as to the issues to be raised on appeal.

Nor is this a case where the legal types among us can sit back and smile and nod about Mr. Humphries' expressions of concern and smirk that his analysis is all wrong. He was right

on the money, from the date of his hearing on the motion for certificate of probable cause, to today. His analysis of the appeal was at least as perceptive as his counsel's analysis, though perhaps rough and not quite so artfully articulated. Still it is expressed on the record, even though ignored by both the trial judge and the Court of Appeals. This Court must hold the Court of Appeals to its own standard and require it to more fully examine motions like the one made by Appellant. Not to do so is an abuse of discretion resulting in ineffective assistance of counsel.

V. Conclusion

Based on the foregoing, Appellant requests reversal of his conviction on the grounds of ineffective assistance of appellate and trial counsel and reversal of the Court of Appeals decision affirming his conviction.

DATED: July 11, 1990.

MOYLE & DRAPER, P.C.

By 
E. Jay Sheen
Attorneys for Thomas R. Humphries, Defendant and Appellant

CERTIFICATE OF SERVICE

On July 11, 1990, I mailed four copies of the foregoing Brief of Appellant to:

R. Paul Van Dam
Dan R. Larsen
Utah Attorney General
Attorneys for Plaintiff
and Respondent
6100 South 300 East
Suite 403
Salt Lake City, Utah 84107

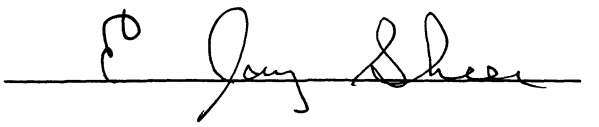

Exhibit 1

FILED

JUL 20 1989

Clerk of the Court
Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

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State of Utah, Plaintiff and Respondent,	)	ORDER
v.	)	Case No. 880704-CA
Thomas R. Humphries, Defendant and Appellant.	)	

This matter is before the Court upon appellant's Motion To Appoint New Counsel On Pendency Of Appeal, filed 26 June 1989.

Appellant is currently represented by counsel who was appointed by the Second Judicial District Court. Counsel entered an appearance herein on 3 February 1989 and, to date, has filed a docketing statement and brief on behalf of appellant. Counsel has responded timely to inquiries made by the Court with respect to this appeal.

Appellant shows no substantial conflict of interest with his attorney. As appellant was appointed competent counsel, IT IS HEREBY ORDERED that appellant's motion is denied. If appellant prefers new counsel, appellant is not precluded from hiring counsel of his choice.

Dated this 20th day of July 1989.

BY THE COURT:

Judge Norman H. Jackson